

August 21, 2023

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-32-10; Proposed Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions; Release No. 34-93784 (“Swaps Proposal”); and

File No. S7-06-22; Modernization of Beneficial Ownership Reporting; Release Nos. 33-11030; 34-94211 (“Beneficial Ownership Proposal”);

File No. S7-08-22; Release No. 34-94313, Short Position and Short Activity Reporting by Institutional Investment Managers (“Short Proposal”)

Dear Ms. Countryman,

We are officers of the International Institute of Law and Finance (“IILF”),¹ a non-profit, non-partisan institution dedicated to promoting independent research, academic papers, teaching, discussion, and public policy initiatives in law and finance. We have drafted and submitted comment letters on the above Releases, with the objective of putting academic views and research in front of the Commission.² We thank the Commission for the opportunity to comment on these Releases, and we thank the Commission Staff for meeting and speaking with us.

We write now in response to the Memorandum dated June 20, 2023 from Staff of the Division of Economic and Risk Analysis on “Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market” (“DERA Swaps Memo”).³ We believe that **the DERA Swaps Memo demonstrates conclusively that the Commission should abandon the Swaps Proposal.**⁴

¹ See <https://iillawfin.org> for a description of our mission and our role.

² As described more fully on the IILF website, we receive compensation for our IILF activities, including drafting the comment letters described herein.

³ See DERA Swaps Memo, <https://www.sec.gov/comments/s7-32-10/s73210-207819-419422.pdf>.

⁴ One alternative approach we suggested was to adopt Rule 9j-1, the anti-fraud rule for security-based swaps, which the Commission has done, and consider requiring disclosure to the Commission only, not the public, with a threshold in the range of 30% of the outstanding securities of the referenced issuer, consistent with the size of the positions notoriously held by Archegos Capital Management, L.P., which ranged from over 30% to over 70%. See Letter from the International Institute of Law and Finance, Nov. 1, 2022, at 2-3, <https://www.sec.gov/comments/s7-06-22/s70622-20149127-316318.pdf>.

As we previously noted, the Swaps Proposal was driven by events involving Archegos Capital Management, L.P. and the credit default swap market.⁵ **Yet the Swaps Proposal did not mention shareholder activism, and neither the Archegos collapse nor the problems in the CDS market involved shareholder activism at all.**

We and others, including the largest number of academic signatories to any comment letter in SEC history, warned that the Swaps Proposal would negatively impact shareholder activism.⁶ We also showed that the Swaps Proposal (1) lacked sufficient support from legal authorities or empirical analysis, (2) was arbitrary and unjustified, and (3) carried numerous unintended consequences, including creating incentives for problematic regulatory arbitrage.⁷ Our overarching point was that the Swaps Proposal was contrary to public policy and the Commission's mission, and instead favored corporate managers and their constituents. The DERA Swaps Memo does not rebut or contradict any of our prior showings.

Instead, the DERA Swaps Memo recognizes and addresses the potential negative impact that we and others warned would follow from the Swaps Proposal. **The DERA Swaps Memo shows that the Swaps Proposal likely would significantly harm shareholder activism, and it does not provide any evidence of potential benefits.** Simply put, the DERA Swaps Memo demonstrates that the cost-benefit scorecard for the Swaps Proposal is a fatal one: costs significant, benefits none.

Moreover, the DERA Swaps Memo warns that “Our analysis is subject to significant limitations in our ability to identify equity security-based swap positions associated with an activist investor.”⁸ We applaud DERA for recognizing the limitations in the Commission's data, and for admitting it could not determine the extent to which particular positions in the database were held by activist investors.⁹ The DERA Swaps Memo transparently describes the flaws and limitations in the data, often with alarming specificity.¹⁰

These flaws and limitations render any conclusions based on the data unreliable. Even after significant efforts, we were unable to replicate the results in the DERA Swaps Memo and

⁵ See Letter from Robert Bishop and Frank Partnoy, Mar. 20, 2022, <https://www.sec.gov/comments/s7-32-10/s73210-20120934-273057.pdf>.

⁶ See Letter from 85 Law and Finance Professors, Jun. 27, 2022, <https://www.sec.gov/comments/s7-32-10/s73210-20120780-272960.pdf>.

⁷ See Letter from Robert Bishop and Frank Partnoy, Mar. 20, 2022.

⁸ DERA Swaps Memo at 12.

⁹ The DERA Swaps Memo states: “Critically, to be included in our sample, the equity security-based swap position must be held by the GLEIF intra-affiliate entities, whose LEI we obtain and search for in the SBSDR database. However, many activist investors are associated with many different funds or other entities, any of which may be party to an equity security-based swap. We are aware of many cases in which an activist investor has equity security-based swap exposure through an entity other than the parent or child entity.” Id.

¹⁰ The DERA Swaps Memo states: “These data on positions do not account for direct equity holdings due to data constraints. Data regarding equity holdings, although potentially available in a smaller number of cases, have yet to be successfully merged broadly with equity security-based swap data positions because of differences in underlying reference data identifiers. Hence, the analysis may undercount the number of activist investors who might need to file Schedule 10B when aggregating both beneficial ownership and equity security-based swap positions.” Id.

we agree with DERA's warnings about available data.¹¹ Accordingly, we believe the DERA Swaps Memo supports a conclusion that there are no reliable data available to assess the potential harms of the Swaps Proposal on shareholder activism. We continue to conclude, as our previous letters showed based on available data and academic research, that these harms would be substantial and widespread.

Nevertheless, to the extent the data described in the DERA Swaps Memo are accurate, we believe DERA has demonstrated conclusively that the Swaps Proposal would harm shareholder activism, with no benefit. The DERA Swaps Memo states that, on any given day in their sample period, shareholder activist investors held dozens of gross positions (as many 63) in referenced securities that exceeded \$300 million of notional amount,¹² and on numerous days shareholder activists held more than 20 positions that exceeded 5% of the market capitalization of the referenced security.¹³

The DERA Swaps Memo also reports other data showing that shareholder activists might have significantly larger numbers of large positions, to the extent they are represented among other market participants in DERA's sample. For example, the DERA Swaps Memo reports that "market participants had, on average on a daily basis, 868 large gross positions, and the largest number of gross positions on any given day is 1,142."¹⁴

These data, if accurate, suggest that the Proposed Swaps Rules would require significant numbers of additional disclosures of positions by market participants. DERA does not estimate either the direct costs of these additional disclosures, or the potential indirect costs from deterring shareholder activism. As we previously noted, the academic literature has shown overall that there are significant benefits from shareholder activism, which suggests that the indirect costs of the Proposed Swaps Rules, based on the new DERA data, would be significant.

Overall, we believe DERA has demonstrated that there would be significant costs to the Swaps Proposal, costs that we and others warned about, but that the Commission did not address in the Proposed Swaps Rules.

Moreover, **there are no data, in the DERA Swaps Memo or otherwise, supporting a conclusion that there would be any benefits from requiring additional disclosures of swaps positions, particularly disclosures by shareholder activists.** Accordingly, the public record now shows that the costs of the Swaps Proposal would be significantly higher than the Commission previously had anticipated, with no evidence of any benefit. Put another way, the Proposed Swaps Rules have **no empirical support based on cost-benefit analysis.** The Commission should abandon them.

¹¹ We note that the DERA Swaps Memo's warnings about the reliability of its data are particularly important when the Commission is relying on in-house data that others do not have, because there is no check from the public, including academics, on whether there are reliable bases for Commission decisions.

¹² Id. at 13.

¹³ Id. at 14.

¹⁴ Id. at 15.

Respectfully,

/s/ Robert E. Bishop

Robert E. Bishop
Associate Professor
Duke Law School

/s/ Frank Partnoy

Frank Partnoy
Adrian A. Kragen Professor of Law
UC Berkeley School of Law
Berkeley Haas (Affiliated Faculty)